

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
CESA #12 EMPLOYEE COUNCIL
Involving Certain Employees of
COOPERATIVE EDUCATIONAL
SERVICE AGENCY #12

Case I
No. 31447 ME-2206
Decision No. 20944-B

Appearances:

Ms. Priscilla R. MacDougall and Mr. Timothy J. Laux, Attorneys, Wisconsin Education Association Council, 101 West Beltline Highway, P.O. Box 8003, Madison, Wisconsin 53708, appearing on behalf of the Petitioner.
Isaksen, Lathrop, Esch, Hart and Clark, Attorneys at Law, by Mr. Michael J. Julka and Ms. Jill W. Dean, CESA #12, 626 East Slifer Street, P.O. Box 564, Portage, Wisconsin 53901, appearing on behalf of the Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER WITH RESPECT TO CHALLENGED BALLOTS
AND OBJECTION TO ELECTION

Pursuant to a Direction of Election issued on May 25, 1984 in the above-entitled matter, the Wisconsin Employment Relations Commission, herein the Commission, conducted a mail ballot election among certain employees of Cooperative Educational Service Agency #12 for the purpose of determining whether said employees desire to be represented for the purpose of collective bargaining by CESA #12 Employee Council; and the ballots of twelve individuals having been challenged, which challenged ballots will affect the results of the election; and hearing in the matter having been held before Examiner Douglas V. Knudson, a member of the staff of the Commission, at Madison, Wisconsin on June 20, 1984; and at said hearing, CESA #12 Employee Council filed an objection to the conduct of the election; and the Commission, having considered the evidence and arguments of the parties and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That, pursuant to a Direction of Election issued on May 25, 1984, the Commission conducted a mail ballot election among the following voting group:

all regular full-time and regular part-time professional employees of CESA 12, excluding classroom teachers, data processors, accounting personnel, special education aides, technicians, paraprofessionals, and supervisory, managerial and confidential employees, who were employed by CESA 12 on May 25, 1984, except such employees as may prior to the election quit their employment or be discharged for cause, for the purpose of determining whether a majority of said employees desire to be represented by CESA 12 Employee Council for the purpose of collective bargaining with CESA 12 on wages, hours and conditions of employment.

2. That, on June 6, 1984, the Commission sent mail ballots by regular mail to the mailing addresses of the thirteen employees who were employed in the voting group described in Finding of Fact 1; that enclosed to each employee with the mail ballot was a one page sheet which explained the purpose of the election and contained, inter alia, the following instructions to the voters:

Below your name on the return envelope is a space for you to enter the date on which you marked your ballot. PLEASE be sure to enter that date or your vote may not be counted.

and,

If you desire to vote, will you please do so promptly. Your ballot must be received in our office on or before June 14, 1984, or it will not be counted.

3. That, during the course of a June 15, 1984 meeting convened for the purpose of counting of the ballots and at which representatives of the Employer and the Petitioner were present, the Commission's agent conducting the count challenged the ballot of George Jesien on the basis that Jesien's ballot was received in the Commission's office after June 14, 1984; that, also during that meeting the Employer's observer challenged the other eleven ballots received by the Commission, claiming (1) that all of the voters are temporary employees, (2) several of said voters neither have been, nor will be, hired by Cooperative Educational Service Agency #5, and (3) that the employment of two of said voters, Mary Egan and Julia Herwig, ended prior to the dates on which they marked their ballots; and, that the initial tally of results of the meeting was as follows:

1. Total number eligible to vote	13
2. Total ballots cast	12
3. Total ballots challenged	12
4. Total valid ballots counted	0

4. That since the challenged ballots will affect the results of the election, the Commission ordered that hearing be held on said challenged ballots; that hearing thereon was held on June 20, 1984; and that at said hearing the Petitioner timely filed an Objection to the Conduct of Election on the basis that one of the individuals eligible to vote in the election, Jordana Zeger, did not receive a ballot.

5. That the envelope containing Jesien's ballot was postmarked June 14, 1984 and contained the date of June 12, 1984 in the space for the date on which the ballot was marked; and, that said envelope was received at the Commission's offices on June 15, 1984.

6. That in advance of the mailing of the ballots, the Employer had furnished the Commission, at the latter's request, with a mailing address for each of the thirteen individuals, including Zeger, who were on the list of eligible voters for the election; that the address furnished for Zeger was current and correct; that as of June 15, 1984, the Commission had not received an envelope containing a ballot from Zeger; that the objection to the conduct of election filed by the Petitioner is based on the claim that Zeger did not receive a ballot in the mail, and therefore, was denied an opportunity to vote in the election; and that the Commission was not informed prior to June 15, 1982 that Zeger had not received a ballot.

7. That all thirteen of the individuals on the list of eligible voters for the election have been notified by the Employer that their employment with the Employer will be terminated either on June 30, 1984, or upon the expiration date of their respective individual employment contracts for 1983-1984, all of which expire on or before June 30, 1984; that Mary Egan's employment contract expired on June 7, 1984; that the envelope containing Egan's ballot was dated as being marked on, and was postmarked, June 13, 1984; that Julia Herwig's employment contract expired on June 7, 1984; that the envelope containing Herwig's ballot was dated as being marked on, and was postmarked, June 8, 1984; and that the ballots received from the remaining employees were all postmarked and hence mailed back to the Commission prior to the respective termination dates of the employment contracts of those employees.

8. That in 1983 the State of Wisconsin passed legislation to abolish the nineteen existing CESA districts and to reorganize the state into twelve CESA districts; and, that as a result of said legislation, the Employer will terminate its operations on June 30, 1984.

Upon the basis of the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSIONS OF LAW

1. That the ballot of George Jesien was not received in a timely manner pursuant to the requirements for voting established by the Commission in this matter and, therefore, that ballot is not valid.
2. That the Petitioner's objection relating to Jordana Zeger does not constitute a basis for setting aside the election or for providing Zeger with an opportunity to vote prior to the counting of the ballots and the certification of the results of the election.
3. That the ballots cast by the remaining eleven employees are valid.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

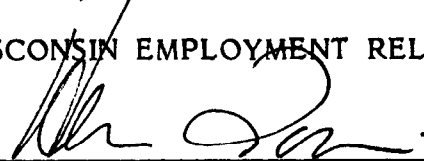
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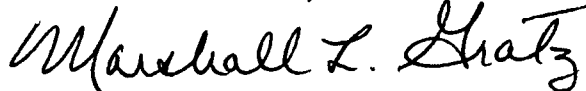
1. That the objection to the conduct of the election filed by the Petitioner herein hereby is denied and dismissed.
2. That the challenge to the ballot of George Jesien is sustained; and that said ballot shall not be opened or counted.
3. That the challenges to the ballots of Victor Barth, Mary Egan, Maureen Griffin, Julia Herwig, Dayton Johnson, Gordon Ness, Neal Schortinghuis, C. G. Shaffer, Joyce Unke, Barbara Wolfe and Frederick Wollenburg hereby are overruled, and, therefore, the ballots cast by said individuals shall be opened and counted on Friday, June 29, 1984 at 10:00 a.m. at the Commission's offices, 14 West Mifflin Street, Madison, Wisconsin.

Given under our hands and seal at the City of
Madison, Wisconsin this 27th day of June, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Herman Torosian, Chairman


Marshall L. Gratz, Commissioner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND ORDER
WITH RESPECT TO CHALLENGED BALLOTS
AND OBJECTION TO ELECTION

CHALLENGED BALLOTS

Alleged Loss of Eligibility

The Employer, contrary to the Association, contends that all of the thirteen individuals on the eligibility list have come to lack a reasonable expectation of continued employment by CESA 12 such that they can no longer be deemed eligible to vote in the election. In that regard, the Employer asserts that each of those individuals' employment by CESA 12 has recently ceased or is about to cease (i.e., on or before June 30, 1984) due to the fact that CESA 12 will cease functioning on that date pursuant to a statutory reorganization of CESA Districts and operations. For that reason, the Employer argues, each of these individuals, at the time he or she voted was either a non-employee or a temporary employee. Therefore, the Employer argues, under established Commission precedent, 1/ each of these individuals was ineligible to vote in the election.

The Association asserts that under the statutory reorganization, CESA 5 will become a successor employer of CESA 12 and that the employees at issue herein have a reasonable expectation of continued employment in the reorganized CESA 5. The Employer, on the other hand, argues that it cannot now be determined whether CESA 5 will be a successor to any of CESA 12's labor relations obligations.

We begin our analysis with the established consideration that employees who lack a reasonable expectation of continued employment are not stripped of municipal employee status for that reason. 2/

Nonetheless, as the Employer argues, the Commission has routinely deemed employees lacking a reasonable expectation of continued employment ineligible to vote in representation elections. Thus, recently, we stated, "The Commission has consistently held that individuals performing duties on a regular full-time or regular part-time basis that are similar to those of the other employees in a bargaining unit but who lack a reasonable expectation of continued employment are ineligible to vote in elections being conducted in a unit of regular full-time and regular part-time employees." 3/ Employees lacking a reasonable expectation of continued employment are not deemed by the Commission to have a sufficient stake in the results of the election or any consequent collective bargaining, when compared with the strength of interests of the balance of the bargaining unit who have a reasonable expectation of continued employment.

In the instant case, however, none of the individuals on the eligibility list can be said to have a continuing expectation of employment by CESA 12. For that reason, the entire group homogeneously shares a common interest in whatever mandatory subjects of bargaining may arise from the Employer's cessation of operations pursuant to the statutory reorganization. The Legislature, in enacting the CESA reorganization apparently anticipated that employees affected by such reorganization might desire to bargain over the impact of the reorganization, as evidenced by the language in Act 27, Sec. 2042(4)(h), 1983 Wis. Legis. Ser. 552 (West) which states:

1/ Citing, for example, Manitowoc County, Dec. No. 15250-B (WERC, 9/77).

2/ Arrowhead School District, Dec. No. 17213-B (6/80), aff'd, 116 Wis.2d 580 (1984); School District of Pittsville, Dec. No. 21806 (WERC, 6/84); Winnebago County (Dept. of Social Services), Dec. No. 10304-A and 10305-A (WERC, 7/79).

3/ School District of Pittsville, Dec. No. 21806 (WERC, 6/84).

The representative of cooperative educational service agency affected by the reorganization of the agencies may bargain collectively over the impact of the reorganization. Notwithstanding section 111.70(4)(cm) of the statutes, if the parties to a collective bargaining agreement reach a deadlock in collective bargaining over the impact of reorganization, either party may petition for mediation-arbitration under section 111.70(4)(cm) of the statutes.

In view of the unusual circumstances of this case noted in the preceding paragraph, and without making or relying upon determinations as to whether the reorganized CESA 5 will succeed to labor relations obligations of the Employer herein, we conclude that all of the individuals on the original eligibility list developed in this matter remain eligible to vote. For, in the circumstances of this case, that entire group of individuals shares a common interest in mandatory subjects of bargaining arising from the Employer's cessation of operations, and hence in this election, sufficient to warrant their participation in the determination of whether a majority of that group voting favors representation by the Association for purposes of collective bargaining with the Employer.

Finally, we note that all thirteen individuals who were sent ballots have met the eligibility criteria established in the Direction of Election by virtue of their being employees as of May 25, 1984, who neither voluntarily quit nor were discharged for cause between said date and the date they voted.

Jesien's Ballot

On June 6, 1984, the Commission mailed a ballot and a notice of election to the thirteen individuals on the eligibility list. The notice of election contained a section entitled "INSTRUCTIONS TO VOTERS," which provided, inter alia, as follows:

If you desire to vote, will you please do so promptly. Your ballot must be received in our office on or before June 14, 1984, or it will not be counted.

Jesien's ballot was received at the Commission's office on June 15, 1984. The eleven other ballots were received on or before June 14, 1984.

In a previous case involving the receipt of a ballot on the day following the date specified for receipt of said ballot, the Commission stated, as follows:

The required time for receipt of the ballot and the consequences of noncompliance therewith were clearly expressed in the "INSTRUCTIONS TO VOTERS", received by Stahl. The policy underlying those instructions is sound and no reasons sufficient to change same, or to except the instant situation from its application have been presented herein. Stahl failed to comply with the deadline for the valid receipt of his ballot. For that reason, it will not be opened or counted. 4/

The Commission believes the aforesaid statement is applicable to the instant matter. Accordingly, Jesien's ballot will not be opened and counted.

OBJECTION TO ELECTION

The Petitioner objects to the conduct of the election because one of the employees on the eligibility list, Jordana Zeger, allegedly did not receive a mail ballot. The Petitioner requests, contrary to the Employer, that the Commission delay the counting of the ballots until Zeger has been issued a ballot and has had an opportunity to return said ballot to the Commission.

The Petitioner agrees that the Employer provided the Commission with Zeger's current mailing address. There is no dispute that the Commission did not receive a mail ballot from Zeger on or before June 14, 1984. At the counting of ballots

4/ Wisconsin Humane Society, Dec. No. 14198-B, (WERC, 7/76).

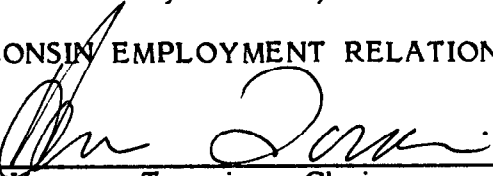
on June 15, 1984, the Commission first learned of Zeger's claim that she had not received a mail ballot. Some of the envelopes containing ballots, which were returned to the Commission, bore postmarks of June 8, 1984. If the Commission had been informed on or even shortly after June 8, 1984 of Zeger's non-receipt of a mail ballot, the Commission could have attempted to furnish her with another ballot. However, since such notification was not received until after the deadline for the receipt of ballots, the Commission will not now furnish Zeger a ballot and an opportunity to vote.

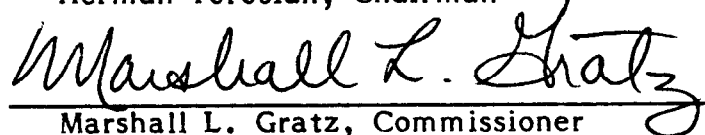
In a previous case, 5/ the Commission denied a similar election objection which was based on an employee's non-receipt of an absentee mail ballot prior to the employee's departure on a vacation. Non-receipt of a mail ballot is one of the risks inherent in that form of balloting. We find no need for further hearing with respect to the objection with regard to Zeger's ballot. That objection is denied.

Dated at Madison, Wisconsin this 27th day of June, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Herman Torosian, Chairman


Marshall L. Gratz, Commissioner

5/ United Community Services of Greater Milwaukee, Dec. Nos. 11281-C and 11282-C, (WERC, 10/73).